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# In the Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK STATE NURSES ASSOCIATION, PETITIONER

*v.*

ST. JOSEPH'S HOSPITAL AND
NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD**

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1. During bargaining negotiations in November 1982, respondent St. Joseph's Hospital (the Hospital) claimed that it could not offer a wage increase because of its financial condition. The Hospital admitted that petitioner (the Union) was entitled to examine the Hospital's financial books and records to verify the accuracy of that claim. The Union requested specific financial records which concededly were relevant to evaluating the Hospital's inability to pay. The Hospital, however, refused to disclose any of the requested records unless and until the Union selected a certified public accountant who met certain qualifications enumerated by the Hospital[1] (Pet. App. 2a-6a, 18a-20a).

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[1]Initially, the Hospital offered to permit a "mutually acceptable qualified CPA" to review its financial records. Thereafter, the Hospital gave the Union a list of specific qualifications that the CPA had to meet

2. The Board, upholding the decision of the administrative law judge (ALJ), found that the Hospital violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to permit the Union's accountant to examine its records as a means of verifying the Hospital's claimed inability to pay a wage increase (Pet. App. 14a, 35a).

The ALJ noted that "[t]he Courts and the Board always have been concerned with balancing the Section 7 rights of employees to have relevant information with the legitimate concerns of employers that the production of such information would be detrimental" (Pet. App. 31a). However, the ALJ found no evidence that release of the requested data to the accountant chosen by the Union would be detrimental to the Hospital (*id.* at 31a-32a). The ALJ further concluded that, even if the Hospital had shown that release of the

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to be acceptable to the Hospital — including "[d]emonstrated knowledge of the New York State Hospital Reimbursement Regulations" (Pet. App. 20a). On November 17, 1982, the Union designated a CPA, but the Union did not indicate the CPA's qualifications or whether he possessed any of the qualifications demanded by the Hospital. On November 24, the Hospital responded, agreeing to the date suggested by the Union for examination of the records but insisting on prior proof that the accountant met the stipulated criteria. On December 1, the Union, by letter, cancelled the scheduled bargaining sessions in light of the Hospital's refusal to accept its accountant, stated that its accountant was "eminently qualified" and added that the Hospital would be able to examine and question his analysis of the records. *Id.* at 21a-22a. During the next five months, although the parties continued to negotiate on substantive issues, they remained at odds on who should review the records. The Hospital took the position that an accountant unfamiliar with the methodologies of the New York State reimbursement system might deliver a misleading report. The Hospital reiterated its willingness to discuss or negotiate any of the specific qualifications that were unacceptable to the Union. In April 1983, the Hospital modified its enumerated qualifications. Throughout the negotiations the Union took the position that it had the right to send in any auditor it chose to examine the financial records. Accordingly, the Union rejected as unreasonable all the qualifications demanded by the Hospital. *Id.* at 22a-23a.

requested information to the Union's chosen accountant would be detrimental by "reach[ing] erroneous conclusions [that] would hamper the collective bargaining process" (*id.* at 32a), the selection criteria for an acceptable accountant imposed by the Hospital were not reasonably related to any such concerns (*id.* at 33a-35a). The ALJ also concluded that the Hospital's insistence upon certain qualifications interfered with the employees' Section 7, 29 U.S.C. 157, right to select their own bargaining representative (Pet. App. 29a-31a). Accordingly, the ALJ recommended, and the Board ordered, inter alia, that the Hospital "permit an examination of its financial books and records by the Union's representative" (*id.* at 37a).[2]

3. The court of appeals denied enforcement of the Board's order, finding that it was not supported by substantial evidence (Pet. App. 12a).

Citing *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), the court stated (Pet. App. 8a) that, where an employee asserts a " 'legitimate and substantial' justification for limiting * * * disclosure," a " 'conditional offer to disclose may be warranted' " even where concededly relevant information is sought by the union. The court found that the Hospital's concern about "labor strife if an unqualified accountant erroneously should report that the hospital could pay a wage increase" was "legitimate and reasonable" (*id.* at 9a-10a). The court further found that "the hospital repeatedly offered to meet with the union to discuss any requirements that the union felt were unreasonable[,]" while "the union ignored the hospital's offer to discuss the

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[2]The Board modified the ALJ's recommended order to require disclosure only in future negotiations, as the parties had reached agreement on a new contract after the close of the unfair labor practice hearing (Pet. App. 13a n.1).

criteria and simply stated that the criteria were all unreasonable — without advancing a single specific objection" (*id.* at 10a). The court concluded (*id.* at 11a):

> under the circumstances of this case, where the hospital's concern over qualifications of the auditor were legitimate and substantial, and where the union rejected all attempts at discussion of the point, made an unsupported categorical objection that all suggested criteria were unreasonable, and insisted that it could appoint anyone it chose to audit the hospital's records, there was insufficient evidence to support the board's conclusion that the hospital had failed to bargain in good faith. [3]

4. As this Court noted in *Detroit Edison Co.* v. *NLRB*, 440 U.S. at 318, "[t]here are situations in which an employer's conditional offer to disclose [relevant information] may be warranted." And see *Yakima Frozen Foods*, 130 N.L.R.B. 1269, 1272-1273 (1961), enforced in relevant part *sub nom. Fruit & Vegetable Packers, Local 760* v. *NLRB*, 316 F.2d 389 (D.C. Cir. 1963) (offer of employer faced with a strike to disclose financial records to an independent accountant but not directly to the union was justified by legitimate concern that the union would engage in secondary boycotts if the union learned the employer's sources of supplies or consignees). The ALJ acknowledged that proposition (Pet. App. 31a), but concluded that in these circumstances the Hospital had not shown any legitimate or reasonable concern justifying its refusal to disclose the information at issue to the Union's chosen accountant.

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[3]The court disagreed with the Board that this case implicated the right of employees to select their own bargaining representative. The court stated (Pet. App. 12a) that "[i]t does not appear * * * that the auditor in these circumstances was intended to function as the union's bargaining representative as distinguished from a source of information."

While the Board believes that the court of appeals should have upheld that finding, the Board has not filed its own petition for a writ of certiorari because in its judgment the difference between the Board and the court presents essentially a factbound issue that does not warrant review by this Court.[4] *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Respectfully submitted.

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[4]Petitioner asserts (Pet. 9) that "[t]he Court of Appeals held that the Hospital had the right to require that the person chosen by the [Union] to review the Hospital's books meet certain qualifications." However, the court did not hold that an employer may unilaterally impose conditions, even if reasonable. Rather, it held that, where the employer raises reasonable concerns about disclosure, the union is required to discuss those concerns in an attempt to reach a mutually agreeable solution. The court "recognize[d] that in some circumstances the parties, after reasonable attempts at negotiations, may be unable to reach agreement over appropriate qualifications. In such a case the Board, of course, may determine whether an unfair labor practice has been committed." Pet. App. 11a.

Petitioner also contends (Pet. 11) that the precedents of this Court establish that, while conditions may be placed in appropriate circumstances on release of information, they may not be placed on who the union may select to review information. However, in *Detroit Edison*, 440 U.S. at 316-317, the Court concluded that the Board had abused its discretion in requiring the employer to turn over certain information directly to the union, rather than to a professional psychologist (as the employer had offered to do), for only the latter course would adequately protect the employer's legitimate interest in the secrecy of the information.